

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7618

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

THE GOVERNMENT OF INDIA AND THE FOOD
CORPORATION OF INDIA,

Plaintiffs-Appellants,

—against—

COOK INDUSTRIES, INC. AND COOK AND COMPANY,

Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT OF ISSUE PRESENTED

Did the District Court abuse its discretion by disqualifying the law firm of Delson & Gordon and Frederick W. Meeker, an associate of that firm, from continuing to represent the plaintiffs in this action?

COUNTERSTATEMENT OF THE CASE

The facts and circumstances which resulted in the disqualification of Frederick W. Meeker and Delson & Gordon as attorneys for plaintiffs were fully presented to the District Court and are succinctly set forth in the opinion of Judge Robert J. Ward, 422 F. Supp. 1057 (1976) (195a-210a).^{*} From the record before the District Court it is clear that for a period of three years immediately preceding his association with Delson & Gordon and deep involvement in the prosecution of the present action, Mr. Meeker acted as the attorney in charge of the defense of defendant Cook Industries, Inc. in two litigations involving issues

^{*} References denoted by the suffix "a" are to the Joint Appendix. References denoted by the prefix "B" are to plaintiffs-appellants' brief to this Court, and by the prefix "PA" are to the addendum to their brief. References denoted by the prefix "DA" are to the addendum to this brief.

substantially related to issues in the present action. In an effort to deflect attention from the facts and applicable legal standards which mandate disqualification, plaintiffs' brief to this Court offers a disjointed presentation of irrelevant and inaccurate matters. That approach by the plaintiffs has made it necessary for defendants to offer this counterstatement of the case to the Court.

A. STATUS OF PRESENT ACTION

On May 3, 1976, plaintiffs, represented by Delson & Gordon, Esqs., instituted the present action against Cook Industries, Inc. and its predecessor company Cook & Co. (hereinafter collectively referred to as "Cook"). Plaintiffs, who were purchasers of grain from Cook, commenced this litigation following a substantial amount of publicity in which Cook was publicly implicated in what has been described as a "grain scandal", involving shipments of grain by Cook to its customers which were purportedly of less quantity and quality than indicated on bills of lading and official weight and grade certificates (141a-143a).*

* Plaintiffs also have instituted four additional actions against other grain companies, in which they employ complaints practically identical to the one in the present action.

In their complaint alleging breach of contract, fraud and unjust enrichment, plaintiffs seek \$25,500,000 in compensatory damages and \$10,000,000 in punitive damages, plus interest, costs, and expenses (13a-14a). By stipulation among the parties, defendants' time to move or answer has been extended until seventy (70) days after the final determination of the motion which is the subject of this appeal (211a-213a).

On July 19, 1976, Fried, Frank, Harris, Shriver & Jacobson, Esqs., attorneys for defendants, first learned that Frederick W. Meeker, Esq., an associate of Delson & Gordon deeply involved in the prosecution of plaintiffs' case, had previously represented Cook in two actions* involving issues substantially related to those in the present action (25a). Defendants' attorneys promptly advised Delson & Gordon of those circumstances, and requested that they voluntarily withdraw as counsel for plaintiffs (25a-26a). Delson & Gordon refused to do so (26a), thereby necessitating the motion which led Judge Ward to order their disqualification in an opinion

* Shui Fa Oil Mill Co., Ltd. v. M/S Norma, 73 Civ. 250 (CES) (S.D.N.Y., Feb. 20, 1976) and Shui Fa Oil Mill Co., Ltd. v. Cook Industries, Inc., 73 Civ. 251 (CES) (S.D.N.Y., Feb. 20, 1976) (hereinafter the "Soybean Actions").

dated November 19, 1976 (195a-210a). It is from that opinion plaintiffs appeal (214a-220a).

Subsequent to the filing of plaintiffs' notice of appeal, defendants moved in the District Court for an order to include certain documents in the record on appeal which had been submitted to the District Court but inadvertently were never docketed or filed. (See 1a-3a and addendum hereto.) Those documents consisted of (a) materials submitted in camera to the District Court pursuant to an agreement among counsel (DA38-39), for use, if necessary, by the District Court in deciding defendants' motion, and (b) the affidavit of Francis J. O'Brien, Esq., a member of the New York City law firm of Hill, Rivkins, Carey, Loesberg and O'Brien (hereinafter "Hill, Rivkins") which had formerly employed Mr. Meeker, describing Mr. Meeker's activities in connection with the Soybean Actions (DA17-19). In an opinion dated January 27, 1977, the District Court denied defendants' application and a cross-motion by plaintiffs for the inclusion of other material in the record (DA59-64).*

* Contrary to plaintiffs' assertion, in its opinion the District Court did not reject the in camera submission in toto (B14), but rather concluded that since it was able to determine from the other materials before it that the (continued on next page)

Although plaintiffs' counsel was requested by defendants to include in the Joint Appendix the District Court's January 27, 1977 opinion and the underlying motion papers, all of which are referred to in the docket sheet (3a), plaintiffs did not do so. They did, however, include as an exhibit to their brief one of the documents which they had unsuccessfully requested the District Court to include in the record on appeal. In order that all of the materials involved with that motion are before the Court, we annex hereto as addendum pages DA59-64 the District Court's opinion, as addendum pages DA1-22 defendants' moving papers, as addendum pages DA23-43 plaintiffs' answering papers with cross application, and as addendum pages DA44-58 defendants' reply papers.

B. FACTUAL BASIS FOR DISQUALIFICATION

- (1) The Soybean Actions and the present action involve substantially related issues

On April 2, 1976, Mr. Meeker left Hill, Rivkins to become associated with Delson & Gordon,

(continued from preceding page)

issues were substantially related, it would have been improper to require Cook to disclose the in camera information to the Court (198a, 207a n.6).

and shortly thereafter became actively involved with the prosecution of the present action (74a).

For approximately three years immediately preceding Mr. Meeker's association with Delson & Gordon, he acted as the attorney in charge of the defense of Cook in two litigations in the Southern District involving claims arising out of the delivery in January 1972, of soybeans to a group of foreign buyers at Reserve, Louisiana, under a contract with Cook (226a, 258a). In the present action, plaintiffs' claims allegedly arise out of deliveries of grain to them, commencing in 1964, at various ports, including Reserve, Louisiana, under various contracts with defendants (5a).

In both the Soybean Actions and the present action, the claims of the respective plaintiffs were that the commodities delivered to them were not of the proper amount or quality, and that the amounts actually delivered to them did not agree with the weight certificates issued at the ports of loading by weighers licensed by the United States Department of Agriculture.*

* Plaintiffs' description of the facts on this point is confusing. Plaintiffs suggest that the entity which conducted the inspection in the Soybean Actions differed from the entity which conducted the inspection in the present (continued on next page)

Specifically, in the present action, plaintiffs claim that grain delivered to them at various ports from 1964 through the date of the complaint, pursuant to contracts with defendants, "were short weight, of lower grade and quality and were infested or contaminated" (7a). Central to plaintiffs' claim is the allegation that the amounts of grain actually delivered to them at various ports, including Reserve, differed from the weights set forth on the weight certificates issued at those ports (10a-11a, B14).

In the Soybean Actions, the plaintiffs had alleged, inter alia, that soybeans shipped to them in January, 1972, from Reserve, Louisiana, under a contract with Cook were not of the "proper amount or quality" (227a). They claimed that the soybeans were delivered to them "in a short, slack and damaged condition", and that when the soybeans were weighed in

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action (B5,8-10). In both the Soybean Actions and the claims in the present action involving Cook's Reserve, Louisiana Elevator, the Destrehan Board of Trade is the USDA licensed entity which determined weights and grades.

Taiwan the amounts did not agree with those set forth on the weight certificates issued at Reserve, Louisiana (226a, 259a).

As Judge Stewart wrote in denying a motion for summary judgment prepared by Mr. Meeker on behalf of Cook in the Soybean Actions, "[T]he primary issue in this case appears to be the weight of the soybeans when they were loaded onto the M/S Norma . . . " (352a).*

Thus, despite plaintiffs' claims to the contrary, it is not surprising that after carefully reviewing the record in the Soybean Actions, the District Court found that the accuracy of the weight certificates was indeed in dispute in the Soybean Actions.**

* Plaintiffs' brief carefully avoids any reference to this finding by Judge Stewart. After quoting another portion of his opinion plaintiffs wrongly conclude: "The Soy Bean Cases were dismissed as to Cook on the certificates of weight and there were no fact issues relevant to Cook beyond these documents" (B22). Not only did Judge Stewart not dismiss the case against Cook at that time, but his opinion specifically cites the weight of the soybeans at the time of loading as the primary fact issue.

** Plaintiffs argue in their brief that the moving affidavits of defendants' attorney, Victor S. Friedman, were not on personal knowledge and are, therefore, inadmissible. However, the District Court based its finding (continued on next page)

As the District Court wrote:

"The issue of the validity and accuracy of the documents was impliedly raised by the complaint [259a*],⁸ was clearly raised by the amended third-party complaint [317a],⁹ and was actively contested by plaintiffs and third-party plaintiff in opposing Cook's motion for summary judgment [276a, 323a, 332a, 337a, 338a, 348a, 352a].¹⁰ In addition, Mr. Meeker is clearly inaccurate in contending that the third-party plaintiff's answer to the Notice to Admit constituted an admission of the accuracy and validity of the documents." (200a-201a)

The District Court properly concluded that even though the parties ultimately did not contest the weight certificates,

"[T]his does not change the fact that the validity and accuracy of the bills of lading and weight certificates had been an issue and Mr. Meeker had to be prepared to meet that issue, i.e., he had to anticipate the proof his adversaries would attempt to adduce. The fact that ultimately no evidence was adduced by his adversaries does not prove that Mr. Meeker did not investigate Cook's loading and weighing procedure to make sure that there was no merit to the allegation. Thus, the Court concludes that it is reasonable to assume that Mr. Meeker might have

(continued from preceding page)

that Mr. Meeker had represented Cook in actions involving issues substantially related to the present action upon uncontroverted facts and documentary materials referred to in Mr. Friedman's affidavit, and not on any statements by Mr. Friedman.

* Bracketed references to the Joint Appendix were, of course, not in the District Court's opinion.

conducted at least a limited investigation into Cook's weighing and loading procedures and thus might have had access to confidential information." (201a-202a)

Although the District Court based its decision upon a review of the record in the Soybean Actions, it does note in passing an incident which demonstrates that at the time Mr. Meeker still represented Cook he recognized the relationship between the issues in the present action and the Soybean Actions (209a). Specifically, on July 8, 1975, during the period in which Mr. Meeker was preparing a stipulation of facts for submission to the court in the Soybean Actions and obtaining the opinion of an expert for an explanation of the reason for differences between loading and arrival weights, he sent a Hill, Rivkins messenger to obtain six back issues of The New York Times (180a, 184a). These six issues contain the following front page stories:

May 20, 1975, p. 1, c. 5, "U.S. Agents Push A Broad Inquiry Into Grain Trade [Subtitle] Guilty Pleas by 5 Inspectors in New Orleans Indicate Irregularities in Handling."

May 22, 1975, p. 1, c. 1, "100 Others Linked to Grain Scandal [Subtitle] Inquiry Said to Be Focusing on Short-Weighting and Profiteering Reports."

May 29, 1975, p. 1, c. 1, "Butz Says Inquiry On Grain Spreads [Subtitle] East

and West Coast Ports Now Involved - Links to Organized Crime Seen."

June 15, 1975, p. 1, c. 4, "Agriculture Aides Halted Grain Investigation in '72."

June 16, 1975, p. 1, c. 3, "Europeans Press Grain Complaints [Subtitle] 6 Executives Visiting U.S. to Voice Grievances and 'Get What We Paid For'."

June 17, 1975, p. 1, c. 6, "Grain Export Study Found Safeguards Were Ignored [Subtitle] Agriculture Report of '73 Said Agency Failed to Meet Its Main Obligations - Some Shortcomings Persist."

June 25, 1975, p. 1, c. 4, "Inquiry Widening On Grain Imports [Subtitle] 2 of the World's Largest Concerns are Reportedly Subject of U.S. Study."

The cost of obtaining these issues was charged to Cook as a disbursement in the Soybean Actions (180a).

Plaintiffs' statement (B26) that "[s]uch articles did not relate to Cook or the Soy Bean Cases in any way and there is no evidence in the record to indicate that they did" is simply untrue. Not only do several of those articles specifically name Cook (May 20 and 22, June 25), the Destrehan Board of Trade (of which Daniel X. Willis was its Chief Weighmaster) (May 20, June 25), and Cook's Reserve, Louisiana, Elevator (May 20 and 22, June 25), but the June 25, 1975 article which contains a photograph of the Reserve Elevator, specifically refers to "suspected violations of the

United States Grain Standards Act by Bunge, Cook and 'official inspection personnel' of the Destrehan Board of Trade, the private agency that inspects their grain." Indeed, in the first two paragraphs of the June 25, 1975 article, Cook is named as one of the subjects of the investigation and plaintiffs claim to base their present action upon activities such as those reported in the foregoing articles (142a-143a).

Again, uncontroverted facts belie plaintiffs' arguments. Not only are the issues substantially related, but Mr. Meeker's own conduct reveals that he no doubt considered the implications of such a relationship in conducting his defense of Cook in the Soybean Actions.

(2) Mr. Meeker's involvement in the Soybean Actions

It is beyond dispute that practically from the day the Soybean Actions came into the Hill, Rivkins office, Mr. Meeker acted as the attorney in that firm defending Cook.

As demonstrated by the April, 1976 bill of Hill, Rivkins to Cook, which sets forth in detail the services rendered to Cook in connection with the Soybean

Actions, the services Mr. Meeker performed for Cook were considerable. The bill is seven pages long, largely single-spaced, and in the amount of \$7,764.85 (166a-172a).

During the more than three years that the Soybean Actions were being actively litigated, Mr. Meeker conducted factual and legal inquiries, prepared and submitted papers to the Court and appeared for Hill, Rivkins on behalf of Cook in court and at meetings with other counsel (166a). In that regard, Mr. Meeker reviewed the documentation associated with the loading at Cook's Reserve Elevator (69a-72a); participated in the development of the facts necessary to prepare and present a stipulation of facts to the court (71a); conducted inquiries as to the loading procedures at Reserve as well as the names of Cook personnel at Reserve (183a);* conducted and responded

* Plaintiffs argue that there is no factual substantiation in the record for the District Court's conclusion that Mr. Meeker ever conducted any investigation of Cook's weighing and loading procedures at Reserve. They refer the Court to general denials in Mr. Meeker's first affidavit. In that affidavit, Mr. Meeker categorically denied ever inquiring as to the names of Cook personnel at Reserve or the loading practices at Reserve (73a). He retracted that denial in a later affidavit (183a), after defendants provided the court with a copy of a letter dated September 26, 1973, from Mr. Meeker to Cook's general counsel in Memphis, Tennessee, in which Mr. Meeker (continued on next page)

to discovery (71a); interviewed the Chief Weighmaster of the Destrehan Board of Trade, Daniel X. Willis (72a), who was licensed by the United States Department of Agriculture to issue weight certificates at Reserve; consulted with general counsel to Cook (183a-184a); obtained the testimony of an expert regarding shortages (73a); and in all other respects acted as the attorney defending Cook against a claim that it had not delivered the agreed upon amount and quality of soybeans.*

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wrote: "We should greatly appreciate your putting us in touch with the people from Cook at Reserve who might have records or recollections of the details of the loading so that we may investigate it further." (Emphasis added.) (178a) Nowhere does plaintiffs' brief mention this recantation.

- * Mr. Meeker swore in his affidavit to the District Court that he had handled the Soybean Actions in the same routine manner as 1,000 other cases he handled during a four year period (compare 61a with 71a), and plaintiffs attempt to give this Court that same impression when they suggest in their brief that this was but one of a large number of admiralty matters handled by Mr. Meeker at Hill, Rivkins (B7).

Although Judge Ward properly noted that the routine nature of the representation would not change the applicable standards (204a), Mr. Meeker's characterization of his handling of the Soybean Actions was sharply challenged by the affidavit of the partner who assigned him to the case. As the affidavit of Francis J. O'Brien, Esq., states:

"I have reviewed our firm's records, and I can state that there is no possibility

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that Mr. Meeker worked on anything like a thousand cases during his employment at our firm

"Most of the matters upon which Mr. Meeker worked for our firm were routine cargo claims cases on behalf of a single client. This client was not in any way related to Cook Industries, Inc. . . . However, the Soybean Action like all other matters handled by our office for Cook Industries, were billed on approximately a time basis. The \$7,500 fee charged Cook Industries for the Soybean Action was a result of Mr. Meeker's advising me that he had put in over 100 hours on the matter and my verification of that estimate from the files

"The Soybean Action concerned the defense of a cargo lawsuit and was different from the routine cases which characterized most of Mr. Meeker's work for the firm."
(DA18-19)

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION
BY DISQUALIFYING THE LAW FIRM OF DELSON &
GORDON AND FREDERICK W. MEEKER, AN ASSOCIATE OF
THAT FIRM, FROM CONTINUING TO REPRESENT THE
PLAINTIFFS IN THIS ACTION

A. INTRODUCTION

This Court has ruled -- recently, repeatedly and unequivocally -- that where a district court decides a motion to disqualify a party's counsel, that decision will be disturbed only if the appellant shows that the district court committed an abuse of discretion. E.g., NCK Organization Ltd. v. Bregman, 542 F.2d 128 (1976); Securities and Exchange Commission v. Sloan, 535 F.2d 679 (1976), cert. denied, 45 U.S.L.W. 3690 (1977); W. T. Grant Co. v. Haines, 531 F.2d 671 (1976); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (1975); Hull v. Celanese Corp., 513 F.2d 568 (1975).

The above rule follows from the district courts' oft-described "responsibility for the supervision of the members of the bar." E.g., NCK Organization Ltd. v. Bregman, supra, 542 F.2d at 131; Hull v. Celanese Corp., supra, 513 F.2d at 571.

In this case, and contrary to the appellants' protestations, Judge Ward did not commit an abuse of

discretion of any kind when he disqualified Delson & Gordon and Mr. Meeker. On the contrary, Judge Ward accurately stated the applicable law and perceptively applied that law to the facts of this case. Accordingly, Judge Ward's order should be affirmed in all respects.

B. JUDGE WARD'S ANALYSIS OF THE LAW AND FACTS
WAS CORRECT

The situation before the District Court provided a clear example of where Canon 4 of the ABA Code of Professional Responsibility (1975) required the disqualification of an attorney and the law firm with which he is associated by reason of the attorney's former representation and present adverse representation of the same client in matters involving substantially related issues.

Canon 4 provides, "A Lawyer Should Preserve the Confidences and Secrets of a Client." In Emle Industries, Inc. v. Patentex Inc., 478 F.2d 562 (2d Cir. 1973), Chief Judge Kaufman discusses in detail the standards for applying Canon 4 and the reasons for their application. In Emle, plaintiffs' counsel, Mr. Rabin, had represented one of the defendants, Burlington, in a prior action. In both actions, an

issue was the nature and extent of Burlington's control of another corporation. In response to Burlington's motion to disqualify Mr. Rabin under Canon 4, Judge Kaufman said:

"We take as our guidepost in applying the language of Canon 4 to this case the standard articulated by Judge Weinfeld in T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953)." Id., at 570.

Judge Weinfeld's standard in the T.C. Theatre case, as discussed in Emle, is contained in the following statement:

"I hold that the former client need show no more than that the matters embraced within the pending suit wherein the former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained." 113 F. Supp. at 268-69, quoted with approval, 478 F.2d at 570 (emphasis supplied by Kaufman, J.)

Since T.C. Theatre was decided, the above rule, sometimes referred to as the "substantial relationship" rule, has been consistently approved and

applied in numerous other cases in which a party sought to disqualify its former attorney from representing an adverse party. E.g., NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976); International Electronics Corp. v. Flanzer, 527 F.2d 1288 (2d Cir. 1975); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); U.S. Industries, Inc. v. Goldman, 421 F. Supp. 7 (S.D.N.Y. 1976).

In the course of holding in Emle that disqualification of the plaintiffs' counsel was appropriate, Judge Kaufman further explained:

"Canon 4 implicitly incorporates that admonition, embodied in old Canon 6, that 'The [lawyer's] obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.'" 478 F.2d at 570.

As noted by Judge Kaufman, regardless of the good faith of the lawyer involved, litigation, by its very nature as an adversarial process, requires strict adherence to the high standards set forth in Canon 4 so as "to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage." Id., at 571.

In keeping with this concern, the Second Circuit has consistently adhered to the proposition that the court cannot inquire as to whether the attorney did in fact receive confidential information. To hold otherwise would present the obvious dilemma of a client who seeks to preserve its confidences with its attorney having to disclose those confidences when moving to disqualify that attorney. Again quoting from T.C. Theatre, the court wrote in Emle:

"[W]here 'it can reasonably be said that in the course of the former representation, the attorney might have acquired information related to the subject matter of his subsequent representation,' T.C. Theatre Corp. [113 F. Supp.], at 269 (emphasis supplied), it is the court's duty to order the attorney disqualified." Id., at 571.

In the present case, Judge Ward properly adopted the "substantial relationship" rule as the governing law. In the course of his analysis of whether the matters were substantially related, Judge Ward focused upon Mr. Meeker's conduct and issues which Mr. Meeker had to be prepared to meet in the Soybean Actions. From that analysis, Judge Ward concluded that in the course of Mr. Meeker's prior representation of Cook he might have acquired related information and that the matters were substantially related. In so doing he applied the test propounded by Judge Weinfeld in T.C.

Theatre for determining whether the matters were substantially related, i.e., "whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation." (199a).

Although plaintiffs argue that this test has been rejected, quite to the contrary, the test has recently been cited by this Court on two occasions.* NCK Organization Ltd. v. Bregman, supra, 542 F.2d 128 (2d Cir. 1976); Hull v. Celanese Corp., supra, 513 F.2d 568 (1975).

In NCK, a corporation and one of its stockholders brought a declaratory judgment action against one of its former officers to determine the rights and obligations of various parties under two stock purchase agreements. NCK's former house counsel who, on the corporation's behalf, had been involved in the

* It is interesting to note that although plaintiffs describe at length in their brief how Judge Kaufman purportedly had rejected this test in U.S. v. Standard Oil Company, 136 F. Supp. 345 (S.D.N.Y. 1955), they make no mention of the fact that Judge Kaufman also wrote the decision in Emle, which cites that test with approval and was decided nearly twenty years after Standard Oil.

preparation of the two stock purchase agreements, became co-counsel to defendant in the declaratory judgment action. Plaintiffs sought to disqualify both its former counsel and defendants' trial counsel.

This Court noted that the plaintiffs' rights under the stock purchase contracts were at issue in the pending suit and that the former counsel of the corporate plaintiff had participated in the formation of those contracts. After concluding that the former counsel's prior representation of the plaintiff was "substantially related" to his subsequent representation of the defendant, he was disqualified. 542 F.2d at 132. Disqualification of the trial counsel was opposed by defendants on the ground

"that actual possession of [plaintiff's] confidences by Randall [plaintiff's former general counsel] and actual disclosure of confidences by Randall to the Weil firm [the trial counsel] must be proven before disqualification of the Weil firm is appropriate." Id., at 134.

This Court, however, disagreed and, after quoting the T.C. Theatre test, held that trial counsel must be disqualified where "some evidence exists of the possibility that disclosures were made in the past of which [trial counsel] cannot dispossess itself." Id.

In Hull v. Celanese Corp., this Court also reaffirmed the validity of the disqualification formula set forth by Judge Weinfeld in T.C. Theatre. In Hull, the plaintiff had brought a sex discrimination action before the EEOC against the defendant. Delulio, a lawyer on defendant's house counsel staff represented defendant in the EEOC proceeding. Thereafter, the plaintiff, represented by trial counsel, brought a sex discrimination action in federal court, and Delulio moved to intervene in that action as a plaintiff. Thereupon defendant moved to disqualify plaintiff's trial counsel. The District Court disqualified trial counsel and this Court, quoting the familiar language from T.C. Theatre, affirmed the disqualification.

Thus, the legal standard applied by Judge Ward for determining whether the matters were substantially related was the correct one, and the conclusions he drew therefrom clearly were not an abuse of his discretion.

Judge Ward found that the validity and accuracy of the bills of lading and weight certificates was a disputed issue in the Soybean Actions (201a-202a); that "[i]t is reasonable to assume that Mr. Meeker conducted some investigation or inquiry" before deciding

to obtain the affidavit of the Chief Weighmaster of the Destrehan Board of Trade, which is the same entity involved in the present action (203a); that Mr. Meeker might have conducted at least a limited investigation into Cook's weighing and loading procedures if only to determine that there was no merit to his adversaries' allegation (202a); and that the contacts which Mr. Meeker maintained with Cook's general counsel were equivalent to contacts with Cook itself (203a-204a). As stated by the District Court, each of these circumstances led it to conclude that Mr. Meeker might have had access to confidential information (202a-204a).

Plaintiffs' argument focuses almost exclusively upon the District Court's conclusion that the weight certificates were a disputed issue in the Soybean Actions. In pursuing their argument, plaintiffs take considerable liberty with the context in which they offer a quotation from the District Court's opinion. Plaintiffs write:

"The court by implication concedes that if
' . . . the alleged shortage in the Soy
Bean Action was never actively litigated;
consequently Mr. Meeker did not have occa-
sion to investigate Cook's loading procedures
or conduct anything more than minimal dis-
covery '" (B17 quoting 200a) (em-
phasis added.)

Although the record contains more than ample evidence from which to conclude that the Soybean Actions certainly were actively litigated, the District Court made no such concession as is claimed by the plaintiffs. The introductory portion to the quote makes it clear that the District Court was stating the plaintiffs' contention, and the conclusory portion of the quote rejects their contention (200a).*

Plaintiffs also argue that the Soybean Actions were breach of contract actions in which fraud was never an issue, whereas the present action has

* The entire paragraph from which the quote is taken states as follows:

"Mr. Meeker and Delson and Gordon strenuously argue that although the instant action and the former actions are superficially similar inasmuch as they relate to alleged shortages by Cook at its grain elevator in Reserve, Louisiana, 'in reality' they are unrelated because, they claim, the alleged shortage in the Soybean Actions was never actively litigated; consequently, Mr. Meeker did not have occasion to investigate Cook's loading procedures or conduct anything more than minimal discovery. This argument addresses the critical issue. However, a thorough examination of the entire record in the Soybean Actions leads this Court to reject Mr. Meeker's assertion that all parties accepted the bills of lading and weight certificates as dispositive of the quantity of soybeans actually loaded onto the ship, obviating discovery." (200a; emphasis added to portions quoted in plaintiffs' brief.)

fraud as its principal issue (B14). Manifestly, that argument entirely ignores plaintiffs' first cause of action which is a ten million dollar breach of contract claim containing no allegations whatsoever of fraud (6a-9a). Moreover, as Judge Ward noted:

"This argument misses the point; the issue is whether Mr. Meeker might have conducted an investigation which might have given him access to confidential information related to the present suit . . . [T]he Court concludes that the normal course of preparation may have required him to conduct an investigation even though he was defending against breach of contract rather than fraud."
(209a n. 11)

Additionally, however, the premise of plaintiffs' argument cannot withstand analysis. Since plaintiffs repeatedly state in their brief that a breach of contract action involving weight and grade certificates can only be maintained if the certificates are set aside on the grounds of fraud or collusion, plaintiffs should not have been surprised that Mr. Meeker recognized that fraud was an element to contend with in the Soybean Actions. As noted by the District Court (208a n. 10), Mr. Meeker specifically raises the possibility of fraud in connection with the affidavit filed by him with the Court in the Soybean Actions.*

* Specifically, Mr. Meeker observed that "[i]f any shortage was listed at (continued on next page)

Not unexpectedly, plaintiffs at times dispute Judge Ward's analysis of the facts, but these disagreements do not justify reversing Judge Ward's decision, particularly in view of the doctrine that "in the disqualification situation, any doubt is to be resolved in favor of disqualification." Hull v. Celanese Corp., supra, 513 F.2d at 571; compare ABA Code of Professional Responsibility, Canon 9 (1975) ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety").

Plaintiffs have offered no support whatsoever for their position that Judge Ward's decision constitutes an abuse of his discretion. In the absence of such a showing, the District Court's decision disqualifying Mr. Meeker and Delson & Gordon* should be affirmed.

(continued from preceding page)

outturn it is either the fault of the carrier for fraudulent bills of lading or the receiver for negligent discharge" (276a). Plaintiffs' disingenuous response to that portion of Mr. Meeker's affidavit is to characterize it as "a gratuitous statement by an inexperienced attorney which made no sense and must be disregarded . . . " (B18).

* The disqualification of Mr. Meeker mandates the disqualification of Delson & Gordon, his employer. See Neiman v. Sanglyn, 75 Civ. 2694 (CMM) (S.D.N.Y. March 8, 1977) (disqualification of a law firm means disqualification of all partners and associates); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129 (5th Cir. 1971) ("Once "an attorney-client relationship [continued on next page]

- C. IN THE EVENT THE DISTRICT COURT'S DECISION IS NOT AFFIRMED, THE MATTER SHOULD BE REMANDED FOR FURTHER PROCEEDINGS IN CONNECTION WITH THE IN CAMERA SUBMISSION

We believe that we have amply demonstrated above that Judge Ward's decision should be affirmed. However, if this Court should determine that it was an abuse of discretion for Judge Ward to have disqualified plaintiffs' counsel upon the record before the District Court, the matter should be remanded with instructions that the District Court review the additional evidence offered to the Court by defendants in connection with their motion.

At the suggestion of Judge Ward, and pursuant to an agreement between counsel for the parties, defendants submitted certain material to the Court, in camera, for use in deciding defendants' motion (DA49-50).*

(continued from preceding page)

is shown, liability to disqualification extends to partners and employees, and former partners and employees, of that lawyer who participated in the attorney-client relationship.")

* This Court has suggested that, if necessary and feasible, such an in camera procedure might be used in connection with a motion to disqualify, Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 926 (2d Cir. 1954), and at least two courts have utilized an in camera procedure to determine whether the attorney in question had obtained confidential information. U.S. v. Wilson, 497 F.2d 602 (8th Cir. 1974); Shelley v. The Macabees, 184 F. Supp. 797 (E.D.N.Y. 1960).

After the materials were submitted to the Court in camera, plaintiffs objected to their submission and the District Court "decided to defer any decision on whether the contents should be disclosed to plaintiffs until it first decided whether the Court itself should make use of the contents in determining the disqualification motion." (DA63 n. 2).

After reviewing all of the evidence before it, the District Court found that there is a substantial relationship between the actions and therefore it would be "unnecessary, and indeed, improper, to inspect the in camera submission" (DA60-61).

We agree with the District Court that there was no need to consider the in camera submission to demonstrate further the substantial relationship between the cases or the fact that Mr. Meeker actually shared his client's confidences. As this Court said in NCK Organization Ltd. v. Bregman, supra, 542 F.2d at 134-135:

"The burden which appellant would place on ORG - to demonstrate that Randall possessed explicit confidences which were received by the Weil firm - is no different from the burden, rejected by the court in Hull, that a former client prove the possession of confidences by its counsel-turned-adversary and prove her conveyance of them to her attorneys. The reasons for this rejection are forceful. Even if proof of receipt of confidential information is available to a former

client, 'he may not be able to use it for fear of disclosure of the very confidences he wishes to be protected.'"

However, if this Court believes that there is insufficient evidence in the record to sustain the order of disqualification, defendants respectfully submit that the matter be remanded with instructions that the District Court inspect the additional evidence submitted by defendants.

This Court has remanded such disqualification cases where it has felt that there were "substantial issues of fact that the trial court did not reach and which we are unable to resolve on the record before us." J.P. Foley & Co., Inc. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975).

CONCLUSION

The District Court clearly did not abuse its discretion in disqualifying Delson & Gordon and Frederick W. Meeker as counsel for plaintiffs. The judgment of the District Court should be affirmed.

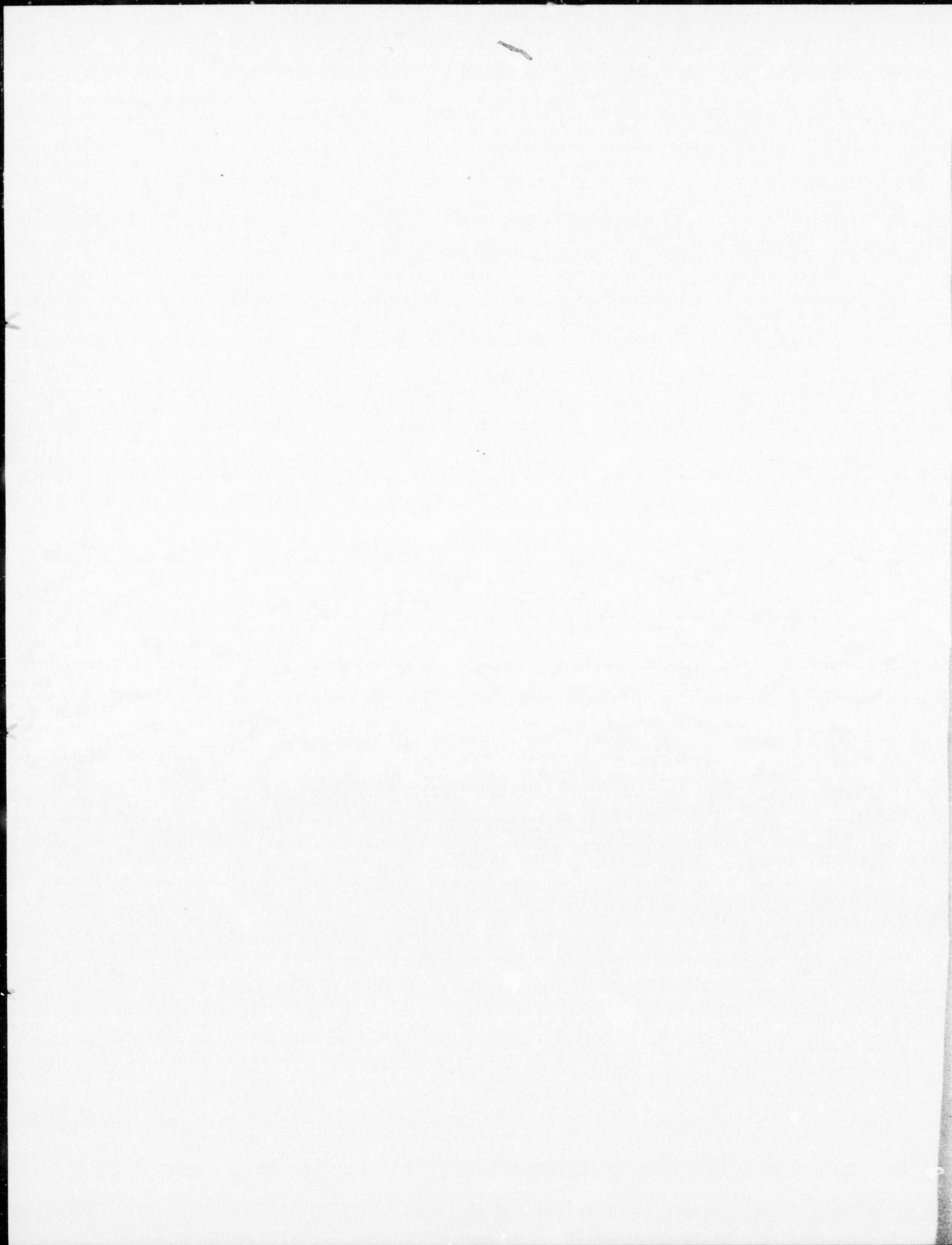
Dated: New York, New York
July 11, 1977

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
Attorneys for Defendants
120 Broadway
New York, New York 10005
(212) 964-6500

Of Counsel:

Victor S. Friedman
Jeffrey M. Siger
David M. Glass



THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GOVERNMENT OF INDIA and THE FOOD
CORPORATION OF INDIA,

Plaintiffs,

- against -

COOK INDUSTRIES, INC. and COOK AND
COMPANY,

Defendants.

:

:

:

:

:

76 Civ. 2001 (R.J.W.)

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE, that upon the attached affidavit of Jeffrey M. Siger, Esq., and the exhibits attached thereto, the Memorandum of Defendants in Support of this Motion, the Complaint and all of the papers and proceedings heretofore had herein, defendants Cook Industries, Inc. and Cook & Company will move before the Honorable Robert J. Ward at 2:15 p.m. on January 25, 1977 in this Court Room 1505, United States Court House, Foley Square, New York, New York or as soon thereafter as counsel can be heard, for an order correcting the Record of Appeal herein by including the materials submitted to this Court on September 15, 1976.

Dated: January 14, 1977

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
120 Broadway
New York, New York
(212) 964-6500
Attorneys for Defendants

TO: DELSON & GORDON
230 Park Avenue
New York, New York 10017
Attorneys for Plaintiffs

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
THE GOVERNMENT OF INDIA and THE :
FOOD CORPORATION OF INDIA :

Plaintiffs, :

AFFIDAVIT

- against - :

76 Civ. 2001 (R.J.W.)

COOK INDUSTRIES, INC. and COOK :
AND COMPANY, :

Defendants. :

-----x
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JEFFREY M. SIGER, being duly sworn, deposes and
says:

1. I am an attorney associated with the firm of
Fried, Frank, Harris, Shriver & Jacobson, attorneys for
defendants, Cook Industries, Inc. and Cook & Co. I submit
this affidavit in support of defendants' application pursuant
to Rule 10(e) of the Rules of Appellate Procedure for an order
directing that certain materials previously submitted to the
District Court but omitted from the Record on Appeal by error
or accident be included in the Record on Appeal. A copy of
this firm's letter, dated September 15, 1976, describing the
specific materials submitted to the Court on that date, is
annexed hereto as Exhibit "A".

2. Judge Ward, in a decision dated November 19, 1976, disqualified Delson & Gordon, Esqs. and Frederick W. Meeker, Esq. as counsel for plaintiffs. Delson & Gordon has appealed that decision to the Court of Appeals. The appeal is presently scheduled to be argued during the week of March 7, 1977. However, plaintiffs (with defendants' consent) have applied to the Court of Appeals for a revised briefing schedule which, if granted, will cause the appeal to be heard at a later date.

3. As is evident from a review of the index of materials submitted by plaintiffs as part of its Record on Appeal (Exhibit "B" hereto) and the docket sheet of the Clerk of the District Court for the Southern District of New York (Exhibit "C" hereto), none of the materials submitted to Judge Ward on September 15, 1976 is included in the Record on Appeal. Specifically those materials are defendants' in camera submission and the affidavit of Francis J. O'Brien, who is a member of the firm which employed Mr. Meeker before his association with Delson & Gordon. (A copy of Mr. O'Brien's affidavit is annexed hereto as Exhibit "D").

4. At a Pre-Argument Conference before Nathaniel Fensterstock, staff counsel to the Second Circuit, I raised this matter and he advised me that in the first instance an

application should be made to Judge Ward to have these materials included in the Record on Appeal.

5. Ms. Kris, Law Clerk to Judge Ward, subsequently advised me that I should make this motion if I were unable to obtain the stipulation of plaintiffs' counsel to include the materials in the Record on Appeal.

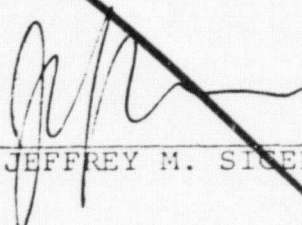
6. On January 11, 1977, I conferred with Alvin Meadow, Esq. of Nelson & Gordon in a good faith effort to obtain his clients' stipulation that the materials be included in the Record on Appeal. Mr. Meadow refused to do so.

7. In footnote 6 to Judge Ward's decision, the Court states that it had declined to review defendants' in camera submission. Subsequently, the Court returned to defendants' attorneys the original packing envelope which contained both the in camera submission (in a separate envelope) and Mr. O'Brien's affidavit. No notation was made on the docket sheet of their submission to the Court.

8. As stated in this firm's covering letter to the Court accompanying the submission of those materials, Mr. O'Brien's affidavit had been served on counsel for plaintiffs.

9. There is no question that the in camera submission and Mr. O'Brien's affidavit were submitted to the

Court in connection with the motion decided by Judge Ward which is the subject of plaintiffs' appeal. It was only through error or accident that those materials were not included in the Record on Appeal, and I respectfully submit that the Court should grant defendants' motion so as to make the Record on Appeal complete.


JEFFREY M. SIGER

Sworn to before me this
13th day of January 1977.

151
Notary Public
New York
County
1978

September 15, 1976

1075-102

BY HAND

The Honorable Robert J. Ward
United States District Judge
United States District Court
United States District Courthouse
Foley Square
New York, New York 10017

RE: Government of India and The Food Corporation of
India v. Cook Industries, Inc. and Cook & Co.
76 Civ. 2001

Dear Judge Ward:

Pursuant to your request and in accordance with the joint letter of counsel dated September 14, 1976, we are submitting herewith for your in camera inspection

(1) an affidavit of Victor S. Friedman, Esq., dated September 15, 1976;

(2) three pages of handwritten notes from the files of Hill, Rivkins; and

(3) an affidavit of John M. Reams, Esq., dated September 9, 1976, with exhibits.

The Honorable Robert J. Ward
Page Two
September 15, 1976

We are also submitting herewith an affidavit
of Francis J. O'Brien, Esq., a copy of which is being
served on counsel for plaintiffs.

Respectfully yours,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON

By Victor S. Friedman

VSF/ps

Enclosures

cc: Delson & Gordon
230 Park Avenue
New York, New York 10017
(w/enclosure: affidavit of
Francis J. O'Brien, Esq.)

DA9

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DA10

-----x
THE GOVERNMENT OF INDIA and
THE FOOD CORPORATION OF INDIA,

Plaintiffs,

-against-

COOK INDUSTRIES, INC. and COOK
AND COMPANY,

Defendants.
-----x

UNITED STATES DISTRICT
COURT - SOUTHERN DISTRICT
OF NEW YORK

CASE NO. 76 Civ. 2001

JUDGE ROBERT J. WARD

INDEX TO THE RECORD ON APPEAL

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Copy of Affidavit of Defendant Continental in Opposition to Plaintiffs' Motion to Assign Actions to Single Magistrate for Discovery	5
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DA12

Exhibit C

Page #1

DEFENDANTS Ward, J.

COOK INDUSTRIES, INC. and
COOK AND COMPANY.

wjf

CAUSE

Breach of Contr., Fraud, unjust enrichment.

ATTORNEYS

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 11-19-76 BY 10012

Fried Frank Harris Shriver &
Jacobson
120 B'way NYC 10005
964-6500

DUBOIS, G. 1963. *Journal of the Royal Society of Medicine* 56: 100-101.

<input type="checkbox"/> CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID		STATISTICAL CARDS	
	DATE MAY 3 1970	RECEIPT NUMBER 69727	C.D. NUMBER	CARD JS 5 JS 6

DATE	NR.	PROCEEDINGS
5-3-76		Fld Compl't & Iss Summs.
6-8-76		Fld Stip & Order that defts time to answer the compl't is ext to 7-1-76..Ward,J
5-19-76		Fld Summs with Marshal's ret Served: Cook Ind and Cook & Co Cook & Co by I. S. Murray on 5-12-76. by " " " " " " " "
7-2-76		Fld Stip & Order that defts time to answer the compl't is ext to 8-2-76..Ward,J.
7-9-76		Fld Pltff's Notice of Motion for an order assigning all actions to a single Magistrate and for an Protective Order....ret 7-20-76-9:30AM. rm 1904.
7-19-76		Fld memorandum of deft Louis D'Eyfus Corp in opposition to pltff's motion for protective order
7-27-76		Fld. Deft.(Peavey Co.) Affdvt. in opposition to Pltffs' Motion for consolidation.
8-3-76		Fld Defts Notice of Motion for an order disqualifying Delson & Gordon as counsel for pltffs.....ret 8-24-76-2:15PM Rm 1106.
8-9-76		Fld Defts memo of law in support to disqualify pltffs' attys.
7-30-76		Fld Stip & Order that the time which defts may answer is ext to 9-30-76 etc...Ward,J.
7-16-76		Fld Copy of affdvt in opposition to pltff's motion assigning a magistrate for these 5 action.
8-20-76		Fld Affdvt of Pltffs' by F. W. Meeker, in opposition to defts(Cook) motion to disqualify Delson & Gordon as counsel ofr pltffs.
8-20-76		Fld affdvt of pltff, by N. Moloshok, in opposition to defts' motion to disqualify pltffs' counsel.
8-20-76		Fld Pltffs' memo of law in opposition to defts' motion to disqualify.
8-23-76		Fld Defts Cook Ind and Cook & Co's Reply affdvt to the pltffs answering papers in opposition of defts for an order disqualifying Delson & Gordon.
8-23-76		Fld Defts' Reply memo in further support of their motion to disqualify pltffs' attys
8-25-76		Fld Pltffs' rebuttal affdvt to defts' motion to disqualify pltffs' counsel.
9-3-76		PRE-TRIAL CONFERENCE HELD BY Ward
9-14-76		Filed defts (Continental Grain, in action 76 Civ 1999) affdvt in opposition to pltffs motion for an order assigning these five actions to a single Magistrate for coordination of pre-trial proceedings. (Filed in 76 Civ 1998 CHT)
10-6-76		Filed Stip & Order ext. to 11-1-76, for defts to move or answer the compl't, etc.....WARD,J.
11-4-76		Filed Stip & Order ext. to 12-1-76 for defts to answer the compl't, etc..Ward,J.
11-19-76		Filed Memo End. on Motion Paper dated 8-9-76== Motion granted with) Opinion filed herewith...Ward, J.
11-19-76		Filed Opinion #45377. After considering all of the foregoing factors this Court has determined to grant defts' motion. Accordingly, Delson and Gordon and Fredrick W. Meeker are disqualified. Pltffs are directed to designate substituted counsel within thirty days of the date of this decision..It is so Ordered.Ward,J. mn

CIVIL DOCKET CONTINUATION SHEET

WARD, J.

PLAINTIFF		DEFENDANT	DOCKET NO. <u>76-2001</u>
THE GOV'T OF INDIA & THE FOOD CORPORATION OF INDIA		COOK INDUSTRIES, INC. & COOK & COMPANY	PAGE <u>3</u> OF <u> </u> PAGES
DATE	NR.	PROCEEDINGS	
12-13-76		Filed pltffs notice of appeal to the USCA from order dtd 11-19-76 disqualifying the law firm of Dailson & Gordon & Frederick W. Mecker from continuing to represent the pltffs in this action. Copy sent Fried Frank Harris Shriver & Jacobson, 120 B'way, New York, N.Y.	
12-14-76		Filed Stip & Order that in the event the pltffs do not appeal from the 11-19-76 order, the time defts may move or answer the S&C is ext. to 2-4-77, with conditions as indicated.....WARD, J. n/m	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
THE GOVERNMENT OF INDIA and THE FOOD :
CORPORATION OF INDIA, :

Plaintiffs, :

- against - :

COOK INDUSTRIES, INC. and COOK AND :
COMPANY :

Defendants. :

AFFIDAVIT

76 Civ. 2001
(R.J.W.)

----- X
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

FRANCIS J. O'BRIEN, being duly sworn, deposes and
says:

1. I am a member of the firm of Hill, Rivkins,
Carey, Loesberg & O'Brien. As the Court is aware, my
firm employed Frederick W. Meeker as an associate from
the spring of 1972 through March 1976.

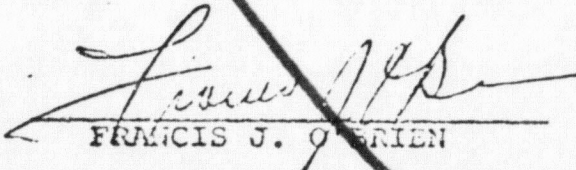
2. In his affidavits of August 19, 1976, and
August 24, 1976, Mr. Meeker makes certain statements
about his work at our firm, particularly in regard to
Shui Fa Oil Mill Co., Ltd. v. M/S Norma, 73 Civ. 250
& 251 (CES) (S.D.N.Y., Feb. 20, 1976) (the "Soybean
action"). Victor S. Friedman, of Fried, Frank, Harris,
Shriver & Jacobson, counsel for defendants, has asked
me to comment on those statements.

3. I have reviewed our firm's records and I can state that there is no possibility that Mr. Meeker worked on anything like a thousand cases during his employment at our firm. More specifically, our firm's records show that at the time Mr. Meeker left our employment, he was carrying a caseload of some ninety-five cases. He was, perhaps, assisting partners in connection with an additional undetermined number of cases, probably not in excess of fifty or sixty cases.

4. Most of the matters upon which Mr. Meeker worked for our firm were routine cargo claims cases on behalf of a single client. This client was not in any way related to Cook Industries, Inc. ("Cook Industries"), one of the defendants herein. During the last two years of Mr. Meeker's employment with the firm, I believe at least 90% of his caseload involved such matters. As Mr. Meeker correctly states, those matters were handled on a contingency basis. However, the Soybean Action, like all other matters handled by our office for Cook Industries, were billed on approximately a time basis. The \$7,500 fee charged Cook Industries for the Soybean Action was a result of Mr. Meeker's advising me that he had put in over 100 hours on the matter and my verification of that estim-

ate from the files. Based on Mr. Meeker's seniority and the fact that a favorable result was obtained, approximately \$75.00 per hour for his time seemed appropriate to me and the client was billed on that basis.

5. The Soybean Action concerned the defense of a cargo lawsuit and was different from the routine cases which characterized most of Mr. Meeker's work for the firm.


FRANCIS J. O'BRIEN

Sworn to before me this
13th day of September, 1976.

LOUIS N. GIANGARDA
Notary Public, State of New York
No. 24-4525900 Qual. in Kings County
Cert. Filed in New York County
Commission Expires March 30, 1978

Clerk's File No. 76 Civ. 2001 (R.J.W.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GOVERNMENT OF INDIA and THE
FOOD CORPORATION OF INDIA,

Plaintiffs,

-against-

COOK INDUSTRIES, INC. and COOK
AND COMPANY,

Defendants.

COPY

AFFIDAVIT

Date 1/15/76 Time 2:20 PM,
Received by A. Gordon
for DELSON & GORDON

Fried, Frank, Harris, Shriver & Jacobson
Attorneys for Defendants

120 Broadway
New York, N. Y. 10005
(212) 964-6500

Clerk's File No. 76 Civ. 2001 (R.J.W.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GOVERNMENT OF INDIA and THE
FOOD CORPORATION OF INDIA,

Plaintiffs,

-against-

COOK INDUSTRIES, INC. and COOK
AND COMPANY,

Defendants

ORIGINAL

AFFIDAVIT

Fried, Frank, Harris, Shriver & Jacobson

Attorneys for Defendants

120 Broadway
New York, N. Y. 10005
(212) 964-6500

Clerk's File No. 76 Civ. 2001(R.J.W.)

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GOVERNMENT OF INDIA and THE
FOOD CORPORATION OF INDIA,

Plaintiffs,

- against -

COOK INDUSTRIES, INC. and COOK
AND COMPANY,

Defendants.

COPY

NOTICE OF MOTION AND AFFIDAVIT

Defendants

Fried, Frank, Harris, Shriver & Jacobson

Attorneys for _____

120 Broadway
New York, N. Y. 10005
(212) 964-6500

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GOVERNMENT OF INDIA and THE
FOOD CORPORATION OF INDIA,

Plaintiffs,

-against-

COOK INDUSTRIES, INC. and COOK
AND COMPANY,

Defendants.

76 Civ. 2001 (R.J.W.)

AFFIDAVIT

STATE OF NEW YORK)
: ss
COUNTY OF NEW YORK)

ALVIN H. MEADOW, being duly sworn, deposes and
says:

1. That he is an attorney and counsellor-at-law
duly admitted to practice in the Courts of the State of
New York and in the United States District Court for the
Southern District of New York, and is a member of the law
firm of Delson & Gordon, attorneys of record for the plain-
tiffs herein and as such is fully familiar with all pro-
ceedings heretofore had herein.

2. This affidavit is submitted in opposition to
the motion of the defendants pursuant to Rule 10(e) of the

Federal Rules of Appellate Procedure to correct errors or omissions in the record of this court with respect to the motion of defendants to disqualify the firm of Delson & Gordon, as attorneys of record for the plaintiffs in the above entitled action.

3. The court, by its decision and Order dated November 19, 1976, directed disqualification of the firm of Delson & Gordon, as attorneys of record for plaintiffs herein. The plaintiffs have appealed from said Order to the United States Court of Appeals for the Second Circuit. The defendants wish to obtain an order pursuant to the afore-said Rule 10(e) of the Federal Rules of Appellate Procedure supplementing the record certified to the United States Court of Appeals by including in such record certain in camera submissions to the District Court in connection with this motion.

4. Inclusion of such in camera submissions in the record to the United States Court of Appeals would be highly improper, would not reflect that which took place in the Court below and further would result in a motion of disqualification being made in secret without the opportunity of the plaintiffs to respond. When the in camera submissions were made to the Court, your deponent and his senior partner, Norman Moloshok, in writing, advised the Court that such in camera submissions were not submitted in accordance with

the intent of the stipulation entered into among the parties and their receipt by the Court would constitute the making of the motion for disqualification in secret, a most unfair procedure. Annexed hereto as Exhibits "A" and "B" are copies of letters of your deponent and that of Norman Moloshok pointing out the unfairness of the receipt by the Court of these in camera submissions.

5. The Court did not in effect receive such in camera submissions but, in fact, returned them to the defendants' counsel, we are advised, in an unopened sealed envelope.

6. In its decision disqualifying the firm of Delson & Gordon, the Court at page 3 of said decision stated as follows:

"In other words, should the Court determine that there is a substantial relation between the two actions, then it will not require the movants to come forward with proof that Mr. Meeker had access to confidences, . . ."

The Court further stated in footnote 6, page ii Notes as follows:

"Accordingly, the Court declines to inspect Fried, Frank's in camera submissions which allegedly contain confidential information to which Mr. Meeker had or has access. But see United States v. Standard Oil Co., 136 F. Supp. 345, 358-59 (S.D.N.Y. 1955) (Kauffman, J.). See also Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 926. (2d Cir. 1954)."

7. Thus, the purport of the decision of this Court is to decide this case upon a determination that the single action in which Mr. Meeker had participated was substantially related to the above entitled action and thus no further proof of access or actual relation of confidences need be supplied by the defendants in support of their motion for disqualification. The Court in effect has not received such in camera submission nor does it consider it apparently proper for it to be part of the record or part of its determination. The defendants, on the other hand, raised the spector of serious confidences being imparted to Mr. Meeker. Your deponent, who is actively involved in this matter, knows of no such confidences, and based upon your deponent's conversations with Mr. Meeker, would challenge the credibility of any such statements that confidences were exchanged, or for that matter knowledge obtained with respect to the fraudulent operations of the defendants. Such assertions should have the benefit of the light of day so that they may be refuted and put out of the mind of the Court. The defendants should not have it both ways. Either the items are to be presented and considered in open court or they should not be considered at all and should not be made a part of this record.

8. There is no basis for the alleged confidential materials being received by the Court in camera. They allegedly represent confidences communicated to Mr. Meeker and through him to Delson & Gordon. It must be defendants' claim that these confidences have been breached by Mr. Meeker and if not, why disqualify Delson & Gordon? If specific allegations of confidences are made by defendants they should be revealed to Delson & Gordon so they can be refuted. Annexed as Exhibits "C" and "D", respectively, are letters of plaintiffs' counsel dated September 14 and 15, 1976, in which plaintiffs demanded that the secret submission be revealed to them and made the subject of the hearing. The Court, apparently recognizing the impropriety of the submission by defendants, aborted the procedure. If specific confidences are to be relied upon by defendants they should be revealed and subjected to refutation by plaintiffs, and a hearing on credibility held by the Court. The affidavit of Mr. O'Brien was not authorized and also rejected by the Court.

9. Your deponent would wish to consider, however, that the Court permit the adding or modification of the record in question to include the proposed amended complaint of plaintiffs and also the complaint of the United States Government against the defendants herein. These pleadings

should be included because, with respect to the action pending in the United States District Court for the District of Columbia against the defendants, the Court should take judicial notice of such action and further the proposed amended complaint was not submitted in secret but was indeed presented to the Court for its consideration. The purpose of such pleadings is to demonstrate that the nature of the plaintiffs' action is in fraud and these pleadings demonstrate that the present action is not substantially related to the single shortweight soy bean case upon which defendants rely. Annexed hereto as Exhibits "E" and "F" are copies of the pleadings in question.

WHEREFORE, it is respectfully requested that the motion of the defendants pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure to supplement the record on appeal from the Order of the Court disqualifying the plaintiffs' attorneys of record so as to include an in camera submission not considered by the Court be denied and further that the Court direct, pursuant to said Rule 10(e) of the Federal Rules of Appellate Procedure that the record on appeal be modified herein so as to include the proposed amended complaint of plaintiffs and the complaint of the United States

Government against the defendants in an action pending
in the United States District Court for the District of
Columbia, and grant such other and further relief as in
the premises the Court deems proper, including the costs
of this motion.

Alvin H. Meadow
Alvin H. Meadow

Sworn to before me this
20th day of January 1977.

Amelia C. Erbar
Notary Public

AMELIA C. ERBAR
Commission Expires 12/31/83
City of Washington, D.C.
Notary Public for the District of Columbia
Commission Expires Jan. 1, 1978

September 15, 1976

HAND DELIVER

The Honorable Robert J. Ward, U.S.D.J.
United States District Court
United States District Courthouse
Foley Square
New York, N. Y. 10007

Re: Government of India and The Food Corporation
of India v. Cook Industries, Inc., and Cook
& Co. - 76 Civ. 2001

Dear Judge Ward:

The undersigned is in receipt this afternoon of a copy of letter which purports to submit to the Court certain material in camera for the Court's consideration.

It is felt that the receipt at this time of the material in question in camera by the Court would unfairly prejudice the plaintiffs and their attorneys.

It was the understanding of the parties herein, based upon the oral representation to the Court by the defendants, that there were certain documents which the defendants sought to submit to the Court in camera because such documents would disclose confidences. There is no indication in our agreement or any oral understanding between the parties that the defendants would be permitted to serve additional affidavits reciting additional facts which allegedly would justify the disqualification. The receipt of such documents by the Court in camera, in short, constitutes the submission of a motion in secret and it is regarded by plaintiffs' attorneys as being most unfair. It is not believed that it was the intention of the Court to receive such affidavits in secret but merely in the first instance to examine certain documents to ascertain whether or not their confidentiality in secrecy as such would require that they be received in camera.

Honorable Robert J. Ward

2.

September 15, 1976

Your deponent has examined the records of many proceedings of this nature and it must be stated that on each occasion, affidavits by the opposing party were served upon each other and not received in secret.

It must be pointed out that to your deponent's knowledge Mr. Victor S. Friedman has no actual knowledge of what transpired during Mr. Meeker's tenure at the Hill Rivkins firm and thus it is inconceivable how his affidavit could in any way be deemed as being of such a confidential nature that it should be received in camera.

If the Court is willing to permit the submission of additional affidavits on the part of the moving party for consideration, certainly those affidavits must be served upon the opposing side and adequate time be given to the plaintiffs to respond to such affidavits.

It is respectfully submitted that the affidavits and material received by your Honor should not be received in camera and should be first served upon plaintiffs' attorneys. The agreement with defendants' counsel never purported to extend to supporting affidavits and at all times was meant to refer to certain documents which, it is reported, that defendants produce in Court but would not show the contents of to the Court unless received in camera.

The undersigned must object to the procedure involved herein and request that the Court direct that all material and affidavits submitted this date to the Court be first served upon the opposing party if the Court is inclined to receive such affidavits, and adequate time, at least ten (10) days, be granted to the plaintiffs' attorneys to respond to such additional affidavits.

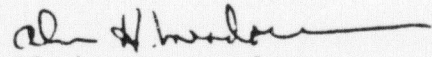
It might be added that your deponent is a member of the firm of Delson & Gordon and actively engaged in this case and has not received any confidences with respect to the operations of Cook Industries, Inc. from Mr. Meeker and any attempt to disqualify this firm would only work a tremendous injustice.

Your courtesy and cooperation in this matter are very much appreciated.

Respectfully yours,

DELSON & GORDON

by


Alvin H. Meadow

AHM.EF

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DA34

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September 17, 1976

BY HAND

The Honorable Robert J. Ward, U.S.D.J.
United States District Court
United States District Courthouse
Foley Square
New York, New York 10007

Re: Government of India and The Food Corporation of India
v. Cook Industries, Inc., and Cook & Co.
75 Civ. 2001

Dear Judge Ward:

The undersigned is somewhat reluctant to encumber the Court with further correspondence from counsel with respect to the disqualification motion in the above-mentioned matter. However, the misleading comments stated in the letter of Victor S. Friedman, Esq. in response to the letter of my partner, Alvin H. Meadow, Esq., compels the undersigned to make response thereto.

I must confirm Mr. Meadow's statement that the understanding reached by counsel was that the several pieces of paper Mr. Friedman held in his hand during the last hearing were the subject of the letter agreement to permit the Court in the first instance to receive this specific material in camera. We did not know what these papers were but it was indicated that they were notes from the Hill, Rivkins' file, presumably in Mr. Meeker's handwriting. It was these papers exhibited in court which were intended to be described in the letter agreement as "material". Both the spirit and language of the letter agreement related to those documents and to none other.

- 2 -

The introduction at this time of affidavits by Mr. Friedman, who could have no personal knowledge of any confidences disclosed to Mr. Meeker, and, the affidavit of Mr. Reams, were not intended to be within the in camera submission consented to by the letter agreement. The receipt of such affidavits in secret, it is submitted, would amount to a most unfair procedure. Surely, if these papers relate to confidences which had been previously revealed to Mr. Meeker and impliedly to other attorneys of this firm, then, of course, he and we should have an opportunity to review and refute them. Certainly, if it is claimed that Mr. Meeker has already received such confidences, there can be no privilege which could preclude him from inspecting those documents and defend himself against the serious allegations made against him. As stated in Mr. Meadow's letter, the use of affidavits in the secret manner suggested by the defendants would constitute the making of a motion in secret, would be grossly unfair and would not be consonant with the Court's suggestion of an in camera examination of the documents specifically referred to at the hearing or with the understanding reached thereafter.

Therefore, I must strenuously object to the recent submission of the affidavits submitted to the Court by the defendants in secret as representing an action contrary to the spirit of the last conference with the Court, the agreement reached between counsel and a breach of the fundamental principles of justice.

Furthermore, the defendants misplace their reliance upon the recent decision of the Second Circuit in NCK Organization Ltd. v. Bregman, docket No. 767075, September 7, 1976. The facts of that case are clearly distinguishable from the present case before the Court and thus the decision in that case cannot be properly used as authority for the position of the defendants on their motion for disqualification. In the NCK Organization Ltd. case, supra, an attorney by the name of Randall was formerly employed as General Counsel and Vice President of the defendant and had represented the defendant with respect to the specific transaction which was the subject of the lawsuit. Indeed, the Court points out at page 1460 of the Court of Appeals slip decision that Mr. Randall may indeed be a witness to an essential element of the case, that is, the corporate state of mind of the defendant in that case at the time of the execution of the contracts in question. The disqualification of the plaintiff's lawyers in that case was based upon the fact that they had engaged Mr. Randall as counsel in connection with the particular litigation against his former client.

- 3 -

In the present case, Mr. Meeker was merely a young associate who did not come into contact with, receive confidences with respect to, and had no opportunity to learn the overall practices of the defendant. The case which Mr. Meeker worked upon did not involve the exact transaction (as in the NCK Organization Ltd. case) and is not substantially related to the present case before the Court.

In Silver Chrysler Plymouth v. Chrysler Motor Corp., 370 Fed. Supp. 581 at 587 (1973), Judge Weinstein points out that the persuasiveness and detail of proof required to establish access to confidential matters will vary inversely with the stature of the of the lawyer in the firm. Thus, since Mr. Meeker was a young associate at the Hill, Rivkins firm, just out of law school, the defendants have a more substantial burden to establish that he had access to the confidences of the defendants in the former case which might be material to the present litigation.

The attention of the Court is directed to the concurring opinion of Judge Mansfield in NCK Organization in which he quotes Hull v. Celanese, 513 Fed. 2d 568, 572 (Second Circuit, 1975) as follows

"The scope of this opinion must, of necessity, be confined to the facts presented and not read as a broad-brush approach to disqualification."

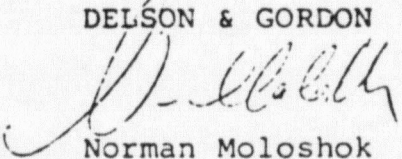
Judge Mansfield then stated that he would not subscribe to "iron-clad" rules or readily follow the broad language of some of the former decisions which could result in an "over kill" when applied to factual situations dissimilar to those presented in the prior decisions.

The defendants have the burden of proof on the present motion. It is submitted that defendants have not satisfied that burden.

It is respectfully requested that the Court schedule a further conference with respect to the foregoing matters

Respectfully yours,

DELSON & GORDON


Norman Moloshok

NM/eps

c.c. Messrs. Fried, Frank, Harris, Shriver & Jacobson

DA37

Exhibit C

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

DA38

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FREDERICK SASS
COUNSEL

OUR REFERENCE

1075-102

September 14, 1976

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KENNETH R. BLACKMAN
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ARTHUR A. FEDER
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GEORGE A. SPIEGELBERG
COUNSEL

The Honorable Robert J. Ward
United States District Court
United States District Courthouse
Foley Square
New York, New York 10017

RE: Government of India and The Food Corporation of
India v. Cook Industries, Inc. and Cook & Co.
76 Civ. 2001

Dear Judge Ward:

At your request, the attorneys for the parties submit this letter in connection with defendants' motion to disqualify plaintiffs' counsel.

At a pretrial conference held on September 3, 1976, your Honor suggested that the parties confer as to the applicability of several alternative procedures with respect to the pending motion, namely (a) submitting the motion on the present record; (b) holding an evidentiary hearing; or (c) permitting the defendants to submit such material as they deem confidential to the Court in camera and, if the Court deems the material to be confidential, the Court would not disclose the same but would ask such questions of Mr. F. W. Meeker as it deems appropriate.

Defendants propose to submit such material but only with the understanding that by such a submission, they are not waiving the attorney-client privilege and that the confidential nature of the material will be preserved.

The Honorable Robert J. Ward
Page Two
September 14, 1976

Both defendants and plaintiffs agree that as the first step, the defendants may submit the material to the Court in camera for the purposes set forth above.

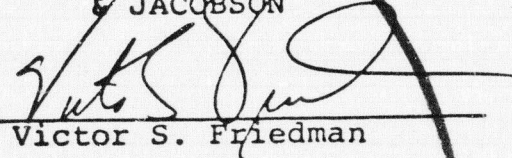
Beyond this, the parties do not agree.

Plaintiffs do not concede that such material is confidential, especially any material which may have been written by Mr. Meeker or which is alleged to have been in his knowing possession during his prior employment. Additionally, plaintiffs submit that a full evidentiary hearing must be held in the event that the Court is inclined to grant the defendants' motion. Defendants submit that such a hearing will destroy the very confidential relationship they are seeking to protect.

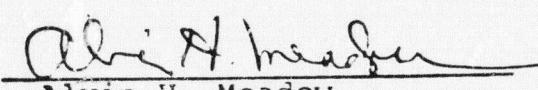
Defendants are prepared to make their in camera submission at such time as the Court may direct. It is hoped that after such submission, a subsequent pretrial conference may be successful in resolving the impasse between counsel.

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON

By 
Victor S. Friedman

DELSON & GORDON

By 
Alvin H. Meadow

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

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September 15, 1976

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OUR REFERENCE

1075-102

ARTHUR L. STRASSER 1905-1987

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KENNETH W. B. BLUMMAN
EDWARD CHAZZ
MARC F. CHERNIC
S. ERNEST ESTRO
ARTHUR A. FEDER
JOHN F. FINN JR.
ARTHUR F. FISCHER JR.
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URGENT SHRIVER
MAYER SIEGEL
LEON SILVERMAN
HERMANN E. SIMON
LEWIS A. STERN

GEORGE A. SPIEGELBERG
COUNSEL

BY HAND

The Honorable Robert J. Ward
United States District Judge
United States District Court
United States District Courthouse
Foley Square
New York, New York 10017

RE: Government of India and The Food Corporation of
India v. Cook Industries, Inc. and Cook & Co.
76 Civ. 2001

Dear Judge Ward:

Pursuant to your request and in accordance with
the joint letter of counsel dated September 14, 1976, we are
submitting herewith for your in camera inspection

(1) an affidavit of Victor S. Friedman,
Esq., dated September 15, 1976;

(2) three pages of handwritten notes
from the files of Hill, Rivkins; and

(3) an affidavit of John M. Reams, Esq.,
dated September 9, 1976, with exhibits.

The Honorable Robert J. Ward
Page Two
September 15, 1976

We are also submitting herewith an affidavit
of Francis J. O'Brien, Esq., a copy of which is being
served on counsel for plaintiffs.

Respectfully yours,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON

Victor S. Friedman

VSF/ps

Enclosures

cc: Delson & Gordon
230 Park Avenue
New York, New York 10017
(w/enclosure: affidavit of
Francis J. O'Brien, Esq.)

Exhibit E is included in the addendum to plaintiffs' Brief (PA3).

Exhibit F is over 100 pages long, and for that reason is not included in this addendum. However, according to the Docket Sheet (3a), it is on file with the District Court.

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
THE GOVERNMENT OF INDIA and THE
FOOD CORPORATION OF INDIA,

Plaintiffs,

-----X
- against -

COOK INDUSTRIES, INC. and COOK
AND COMPANY,

Defendants.
-----X

76 Civ. 2001 (R.J.W.)

REPLY
AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JEFFREY M. SIGER, being duly sworn, deposes and says:

1. I am an attorney associated with Fried, Frank, Harris, Shriver & Jacobson, attorneys for defendants Cook Industries, Inc. and Cook and Company. I submit this Affidavit in support of defendants' application to correct the Record on Appeal (the "Record") and in reply to plaintiffs' memorandum and affidavit in opposition to defendants' application.

2. In the January 20, 1977 Affidavit of Alvin H. Meadow, Esq., counsel for plaintiffs (the "Meadow Affidavit"), Mr. Meadow claims that the court "in effect" has not received the in camera submission, nor did the court "consider it apparently proper for it to be part of the record or part of its determination" (Meadow Affidavit ¶7). I must respectfully point out that even if the court did not rely upon the in camera submission

in reaching its decision, the in camera submission was in fact presented to the court, and thus should properly be included as part of the Record.

3. In addition, Mr. Meadow argues that the in camera submission fell outside of the terms of the written agreement among the parties submitted to the court as governing the submission. A review of that agreement (Exhibit E hereto), and defendants' response to plaintiffs' sudden objection to the in camera submission (Exhibit F hereto) demonstrates that Mr. Meadow's claim is without merit. The in camera submission submitted to and before the court was in form and substance as agreed to among the parties. The court's decision not to examine the submission in reaching its decision does not mean it is not properly part of the Record.

4. Plaintiffs also object to the inclusion of the Affidavit of Mr. O'Brien in the Record, even though plaintiffs were served with a copy of that Affidavit prior to its submission to the court. Obviously, none of plaintiffs' claims about "secret" submissions have any bearing on this submission. Indeed the only reason offered by plaintiffs for excluding that Affidavit from the Record is the unsupported contention that its submission was "rejected" by the court because it was "unauthorized" (Meadow Affidavit ¶8).

5. Defendants have made this application to correct the Record in order that materials presented to and before the District Court be before the Court of Appeals. It may very well be that the Court of Appeals will conclude that a review of these materials is necessary before reaching its decision. At that point, unless these materials are included in the

Record the only option available to the Court of Appeals will be to direct that further proceedings occur so as to make these materials available to it. However, including these materials in the Record obviously does not prevent the Court of Appeals from choosing not to examine the materials. At the very least, it would appear in the best interests of judicial economy to include these materials in the Record so that the Court of Appeals will have the option of considering whether or not to examine them.

6. Although plaintiffs have chosen to resist defendants' efforts to cure a clear omission from the Record, plaintiffs are at the same time requesting in their answering papers (which defendants respectfully suggest is an improper way to proceed) that the Record be amended to include two documents never before the court; indeed, one of which was not even in existence until more than a month after Judge Ward had rendered the decision which is the subject of plaintiffs' appeal. Plaintiffs' Exhibit F is a complaint filed by the United States Government in the United States District Court for the District of Columbia on December 22, 1976, whereas Judge Ward's decision is dated November 19, 1976. Thus, plaintiffs are asking that the District Court include as part of the Record of what transpired before it, a document non-existent at the time it was considering and deciding the motion.

7. The second document (Plaintiffs' Exhibit E) is an amended complaint which plaintiffs unsuccessfully sought permission to serve during the pendency of defendants' motion to disqualify their counsel.

Plaintiffs' request was denied pending the outcome of the motion. Defendants' position at the time was that to permit the amended complaint to be filed would represent yet a further contribution by Delson & Gordon to the prosecution of its clients' case against defendants; a role which was the very subject of defendants' motion (see Exhibit G hereto). That consideration is even more compelling at this point, because to include the amended complaint in the Record will make public the contribution of Delson & Gordon to a case in which it has been disqualified.

8. I respectfully submit that the Court should grant defendants' application to correct the Record so that the in camera submission and Mr. O'Brien's affidavit, which were omitted only by error or accident, are available to the Court of Appeals. I also respectfully suggest that the Court deny plaintiffs' efforts to add materials to the Record which were never properly before the District Court.

/s/

JEFFREY M. SIGER

Sworn to before me this
25th day of January 1977.

/s/

Notary Public

MARILYN N. GOLDMAN
Notary Public, State of New York
No. 314571865
Qualified in New York County
Commission Expires March 30, 1978

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

DA49

ARTHUR L. STRASSER (1905-1987)

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COUNSEL

September 14, 1976

OUR REFERENCE

1075-102

The Honorable Robert J. Ward
United States District Court
United States District Courthouse
Foley Square
New York, New York 10017

RE: Government of India and The Food Corporation of
India v. Cook Industries, Inc. and Cook & Co.
76 Civ. 2001

Dear Judge Ward:

At your request, the attorneys for the parties submit this letter in connection with defendants' motion to disqualify plaintiffs' counsel.

At a pretrial conference held on September 3, 1976, your Honor suggested that the parties confer as to the applicability of several alternative procedures with respect to the pending motion, namely (a) submitting the motion on the present record; (b) holding an evidentiary hearing; or (c) permitting the defendants to submit such material as they deem confidential to the Court in camera and, if the Court deems the material to be confidential, the Court would not disclose the same but would ask such questions of Mr. F. W. Meeker as it deems appropriate.

Defendants propose to submit such material but only with the understanding that by such a submission, they are not waiving the attorney-client privilege and that the confidential nature of the material will be preserved.

The Honorable Robert J. Ward
Page Two
September 14, 1976

Both defendants and plaintiffs agree that as the first step, the defendants may submit the material to the Court in camera for the purposes set forth above.

Beyond this, the parties do not agree.

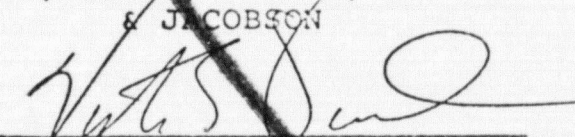
Plaintiffs do not concede that such material is confidential, especially any material which may have been written by Mr. Meeker or which is alleged to have been in his knowing possession during his prior employment. Additionally, plaintiffs submit that a full evidentiary hearing must be held in the event that the Court is inclined to grant the defendants' motion. Defendants submit that such a hearing will destroy the very confidential relationship they are seeking to protect.

Defendants are prepared to make their in camera submission at such time as the Court may direct. It is hoped that after such submission, a subsequent pretrial conference may be successful in resolving the impasse between counsel.

Respectfully submitted,

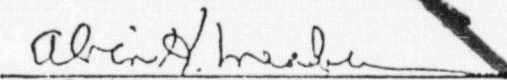
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON

By


Victor S. Friedman

DELSON & GORDON

By


Alvin H. Meadow

DA51

Exhibit F

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

DA52

ARTHUR L. STRASSER (905-1067)

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September 16, 1976

OUR REFERENCE

1075-102

HAND DELIVERY

The Honorable Robert J. Ward, U.S.D.J.
United States District Court
United States District Courthouse
Foley Square
New York, New York 10007

Re: Government of India and The Food Corporation
of India v. Cook Industries, Inc. and Cook &
Co. - 76 Civ. 2001 (R.J.W.)

Dear Judge Ward:

Late yesterday afternoon, I received a copy of a letter, dated September 15, 1976, addressed to your Honor from Alvin H. Meadow, Esq. of Delson & Gordon. Frankly, the substance of Mr. Meadow's letter surprises me.

Mr. Meadow's partner Mr. Moloshok, not Mr. Meadow, attended the pre-trial conference before your Honor on September 3, 1976, in which we discussed possible alternatives for proceeding with the motion. Contrary to Mr. Meadow's assertion, at no time did I ever state or even intimate that the materials to be submitted in camera would be confined to "certain documents". Nor does our joint letter to your Honor contain any suggestion whatsoever of the restrictions which Mr. Meadow now claims were to govern the submission in camera.

Hon. Robert J. Ward

-2-

September 16, 1976

Our joint letter to this court clearly and unequivocally states that the procedure adopted by the parties was one "permitting the defendants to submit such material as they deem confidential to the court in camera."

Repeatedly, plaintiffs have called for Mr. Beams to describe his discussions with Mr. Meeker, and defendants have consistently maintained that the substance of these conversations, as well as of documents, are of a confidential nature. As such, if they must be revealed it could only be as part of an in camera submission. Having agreed in advance to the in camera submission, the present efforts of plaintiffs' counsel to have the court reveal these confidential materials to them is, I submit, highly improper.

I cannot overemphasize my position that defendants' in camera submission deviates in no way whatsoever from our respective firms' agreement. However, since my affidavit does nothing more than describe the materials submitted to the court, if the court believes it appropriate to do so, I have no objection to providing Delson & Gordon with a copy of my affidavit, with references to the substance of Mr. Beams' affidavit and the handwritten notes deleted.

I also wish to note respectfully that we continue to maintain that the court should grant defendants the relief which they seek without the in camera submission. Plaintiffs assert that defendants must demonstrate the actual confidences which were reposed in Mr. Meeker and demonstrate that these confidences were transmitted to their firm. The Second Circuit consistently has rejected that position and has done so as recently as last week. In upholding Judge Motley's disqualification of counsel the Second Circuit in NCK Organization Ltd., et al. v. Bregman, (Docket No. 76-7075, Sept. 7, 1976), expressly reaffirmed its earlier position in Hull v. Japanese Corp., 513 F.2d 568 (2d Cir., 1975) which specifically rejects plaintiffs' claim that the party seeking disqualification has any such burden.

Specifically the court in NCK stated:

"The burden which appellant would place on ORG - to demonstrate that Randall possessed explicit confidences which were received by the Weil firm - is no different from the burden, rejected by the court in Hull, that a former client prove the possession of confidence by its counsel-turned-adversary and prove her

Hon. Robert J. Ward

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September 16, 1976

conveyance of them to her attorney's. The reasons for this rejection are forceful. Even if proof of receipt of confidential information is available to a former client, 'he may not be able to use it for fear of disclosure of the very confidences he wishes to be protected.'" Id. at 5466-67.

For the convenience of the court, a copy of the opinion is enclosed.

Respectfully submitted,


Victor S. Friedman

VSF:ka

Enclosure

cc: Delson & Gordon, Esqs.

DA55

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

DA56

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FREDERICK SASS
COUNSEL

October 18, 1976

OUR REFERENCE

1075-102

HAND DELIVERY

Honorable Robert J. Ward
United States District Court
United States District Courthouse
Foley Square
New York, New York 10007

Re: Government of India and The Food Corporation of
India v. Cook Industries, Inc. and Cook & Co.
76 Civ. 2001

Dear Judge Ward:

We received in today's mail a copy of Delson & Gordon's letter to Your Honor, dated October 12, 1976, in which they request permission to file an amended complaint.

We previously have advised Delson & Gordon that we believe they should withhold service and filing of what they claim to be a more factually complete complaint while defendants' motion to disqualify their firm is sub judice. To wait, we submit, presents no possibility of prejudice to their clients, and avoids possible further prejudice to our clients.

Our concern, of course, is with Delson & Gordon's continuing contribution to the prosecution of plaintiffs'

FRIED, FRANK HARRIS, SHRIVE : JACOBSON

DA57

Honorable Robert J. Ward

-2-

October 18, 1976

case against our clients. In that connection, I must note that Delson & Gordon's statement that the schedule annexed to the amended complaint is "identical to that forwarded to the defendants by the Embassy," is inaccurate. A comparison of the two schedules shows that the schedule annexed to the amended complaint refers to additional purported shipments, and, in some instances, raises additional complaints for previous listings.

Respectfully submitted,

Victor S. Friedman

VSF:ka

cc: Delson & Gordon, Esqs.

Clerk's File No. 76 Civ. 2001 (R.J.W.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE GOVERNMENT OF INDIA and THE
FOOD CORPORATION OF INDIA,

Plaintiffs,

- against -

COOK INDUSTRIES, INC. and COOK
AND COMPANY,

Defendants.

COPY

REPLY
AFFIDAVIT

Fried, Frank, Harris, Shriver & Jacobson
Attorneys for Defendants

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Date 1/25/77 Time 1:25 PM
Received by M. L. Nelson
for NELSON & GORDON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
THE GOVERNMENT OF INDIA and
THE FOOD CORPORATION OF INDIA,

Plaintiffs,

:
76 Civ. 2001
R.J.W.

-against-

:
COOK INDUSTRIES, INC. and
COOK AND COMPANY,

Defendants.
-----x

1
Defendants move pursuant to Fed. R. App. P. 10(e)
for an order supplementing the Record on Appeal with respect
to this Court's November 19, 1976 order disqualifying
plaintiffs' counsel. Plaintiffs oppose the inclusion of
the materials sought to be added by defendants, but apply
for inclusion of other materials in the Record on Appeal.
Because this Court is not empowered to supplement the Record
on Appeal by the addition of materials not filed and not
considered by this Court in rendering its decision, Munich
v. United States, 330 F.2d 774, 776 (9th Cir. 1954);
Armstrong v. O'Connell, 403 F. Supp. 825, 826-28 (E.D. Wis.
1976); see United States v. Smith, 493 F.2d 906, 907 (5th
Cir. 1974); cf. Belt v. Holton, 197 F.2d 579, 581-82 (D.C.
Cir. 1952); United States v. Forness, 125 F.2d 928, 931 n.3
(2d Cir.), cert. denied, 316 U.S. 964 (1942), the requested
relief is denied.

However, Fed. R. App. P. 10(c) does empower this Court to clarify whether these proffered materials were before it when it rendered the decision now being appealed. Armstrong v. O'Connell, supra; 9 J. Moore, Federal Practice ¶210.08[1] (1975). See also United States ex rel. Mulvaney v. Rush, 487 F.2d 684, 687 & n.5 (3d Cir. 1973). Accordingly, although it is ultimately for the Court of Appeals to decide whether to include any of the requested materials in the Record on Appeal, Armstrong v. O'Connell, supra, to assist in that determination this Court now proceeds to explain its view of whether any of the so-called supplementary materials were before it when its decision was rendered.

Defendants seek to add two items to the Record: (1) their sealed in camera submission and (2) the affidavit of Francis J. O'Brien which they had served on plaintiffs, as stated in the final paragraph of defendants' September 15, 1976 letter to this Court, but which was overlooked by this Court because defendants, the Court recently learned, had inadvertantly submitted this affidavit in an envelope enclosed within the sealed outer envelope which was marked "in camera" and contained the in camera submission. For some reason, perhaps because of the controversy generated by the in camera submission, the sealed package was never docketed and filed, but remained in Chambers. ² More importantly, the Court found it unnecessary and, indeed, improper to inspect

the in camera submission. The Government of India et al. v. Cook Indus., Inc. et al., 76 Civ. 2001 (S.D.N.Y., Nov. 19, 1976), at 3 & n.6. Consequently, it never opened the sealed outer envelope and therefore did not see Mr. O'Brien's affidavit. Thus, although both the in camera submission and Mr. O'Brien's affidavit were physically present in Chambers, they were not part of the record on which this Court based its decision. For this reason, this Court cannot now order them to be added to the Record on Appeal.

Plaintiffs, likewise, seek to add two items to the Record: (1) an amended complaint and (2) a copy of a complaint against defendant Cook Industries, Inc. filed in the United States District Court for the District of Columbia by the United States government.

As to the first item, it is true, as plaintiffs assert, that it differs from the in camera submission sought to be included by defendants in that the amended complaint is not "secret". However, the amended complaint was never docketed and filed because this Court decided that plaintiffs' informal application for leave to file the amended complaint should be held in abeyance pending the disposition of the disqualification motion. More importantly, although the amended complaint was physically submitted to Chambers and was quickly perused when submitted, it was not formally part of the record and was not considered by this Court on the disqualification motion. Accordingly, this Court cannot order it to be included.

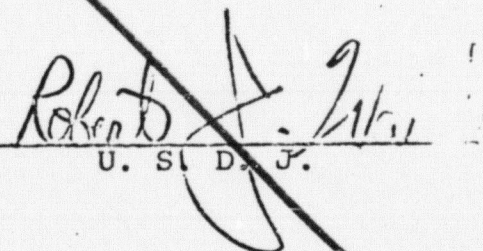
in the Record.

As to plaintiffs' second item which it sought to be added to the Record, the complaint against defendant Cook Industries, Inc. filed by the United States government in the United States District Court for the District of Columbia, there is no question that this item was never submitted on the disqualification motion and played no part in the decision thereon. Therefore, the Court cannot order it to be included in the Record on Appeal.⁴

Accordingly, defendants' motion and plaintiffs' application are denied.

It is so ordered.

Dated: January 27, 1977



U. S. D. J.

NOTES

- 1 Fed. R. App. P. 10(e) provides:

(e) Correction or Modification of the Record.
If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

- 2 Plaintiffs' attorneys telephoned Chambers immediately to object to the submission, and reiterated their strenuous objection in letters to this Court dated September 15 and 17, 1976. In view of plaintiffs' objection, the Court decided to defer any decision on whether the contents should be disclosed to plaintiffs until it first decided whether the Court itself should make use of the contents in determining the disqualification motion.
- 3 Since this Court's inquiry is limited to whether the proffered items were part of the record on which its decision was based, once again it is unnecessary to address plaintiffs' argument that submission of the in camera materials amounts to making a motion in secret. Likewise, plaintiffs' argument that "[t]he affidavit of Mr. O'Brien was not authorized and also rejected by the Court," Aff. of Mr. Meadow, ¶8, misses the point. Nevertheless, to set the record straight it should be noted that Mr. O'Brien's affidavit was overlooked, but not rejected, by the Court. Further, insofar as the affidavit was not one of the purported confidences that the parties apparently contemplated should be included in the in camera submission, it was not "authorized" to be enclosed in the sealed envelope containing the in camera materials. However, that is not to say that defendant necessarily could not have properly submitted Mr. O'Brien's affidavit.

- 4 It is therefore unnecessary to address plaintiffs' argument that this Court should take judicial notice of the complaint in the District of Columbia action.

